Date: December 19, 1996

Case No.: 95-INA-00167

In the Matter of:

KAMAL'S MIDDLE EASTERN SPECIALTIES,
Employer

On Behalf Of:

SABER ALBAROUKI,
Alien

Appearance: Lawrence B. Wolov, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 21, 1993, Kamal's Middle Eastern Specialties ("Employer") filed an application for labor certification to enable Saber AlBarouki ("Alien") to fill the position of Middle Eastern Specialty Cook (AF 43-44). The job duties for the position are:

> Will prepare, season, and cook all types of Middle Eastern Specialty entrees, appetizers, soups and desserts such as: Baba Ganouge, Falafal, Homus Tahini, Fata Cheese Spinach pie, Beef & Chicken Shish Kabab, and Baklava. Will regulate oven and grill temperatures and will use all type of modern kitchen appliances, utensils and knives.

The requirements for the position are six years of grade school and two years of experience in the job offered.

The CO issued a Notice of Findings on September 26, 1994 (AF 15-17), proposing to deny certification on the grounds that the Employer has failed to comply with Federal Regulations governing the labor certification process for the permanent employment of aliens in the United States found at 20 C.F.R. § 656. Specifically, the CO found that the Employer's wage offer of $9.03 per hour is below the prevailing wage of $10.71 per hour for a Cook II, which could have an adverse effect on the wages and working conditions of U.S. workers similarly employed, and is in violation of §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4). Additionally, the CO found that the Employer's rejection of U.S. applicant Yacov Benaracsh did not arise from lawful, job-related reasons.

Accordingly, the Employer was notified that it had until October 31, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, submitted under cover letter dated October 21, 1994 (AF 7-14), the Employer, Kamal Al Barouki, contended that he offered U.S. applicant Yacov Benaracsh a position as a cook on October 5, 1994, which Mr. Benaracsh declined as he has been working for another employer for three months and is making $19.00 per hour.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on October 28, 1994 (AF 4-6), denying certification because the Employer remains in violation of the regulations at 20 C.F.R. § 656. The CO noted that the Employer has amended Form ETA-750A to reflect an increase in the offered wage to $10.71 per hour, which remedies the defect outlined in the NOF. Regarding the Employer's rejection of U.S. applicant Yacov Benaracsh, the CO stated that:

> This rebuttal response does not correct the violations cited in the Notice. The issue in the Notice was not whether this applicant is still available for your position 9 months after it was advertised, but whether this applicant was lawfully rejected for the position in the first place. Since your rebuttal does not address this applicant's qualifications but rather addresses his current availability for your position, it does not correct/cure the violations cited in the Notice and the application remains in violation of the regulations.

On November 23, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-3), and on December 1, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On September 30, 1996, an Order was issued by the Board requiring the Employer to file a statement of intent to proceed in this matter. The Employer responded on October 14, 1996, that it intends to proceed in this case and requested that a decision be made as soon as possible.

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(7) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers

In this case, the Employer interviewed Yacov Benaracsh, who worked as a chef at two different Middle Eastern restaurants for 1½ years and attended cooking school while in the Israeli Army for 11 months. However, the Employer rejected Mr. Benaracsh stating that he was unable to prepare, season, and cook certain dishes, such as spinach, meat, and chicken pies, and desserts, such as baklava, bird's nest, and mini-roses (AF 38). In the NOF, the CO found that, in light of the applicant's experience and the Employer's limited menu, this was not a lawful reason for rejection (AF 17). Thus, the CO asked the Employer to provide evidence that this applicant is unable and/or inexperienced in preparing Middle Eastern foods. As examples, the CO noted that the Employer may submit menus from the applicant's two previous employers which show that their establishments do not serve the same or similar foods, and/or employment reference letters from the two Middle Eastern restaurants which reflect that this applicant is unable and/or inexperienced in preparing the above-mentioned Middle Eastern foods.

In his rebuttal the Employer stated that he spoke with Mr. Benaracsh on October 5, 1994, nine months after his initial rejection, and offered him a position as cook in his restaurant (AF 8). However, Mr. Benaracsh advised him that he has since obtained other employment and was no longer interested in working for the Employer. It is well-settled that, if an employer attempts to contact an applicant after the CO alleges that the applicant was not contacted or interviewed, or was rejected, the fact that the employer shows that the applicant is *now* unavailable does not cure the initial violation. *Bruce A. Fjeld*, 88-INA-333 (May 26, 1989) (*en banc*); *Suniland Music Shoppes*, 88-INA-93 (Mar. 20, 1989) (*en banc*); *Custom Card*, 88-INA-212 (Mar. 16, 1989) (*en banc*); *Amritsar Academy*, 88-INA-34 (Mar. 13, 1989) (*en banc*); *O'Malley Glass & Millwork Co.*, 88-INA-49 (Mar. 13, 1989) (*en banc*); *Done-Rite, Inc.*, 88-INA-341 (Mar. 2, 1989) (*en banc*); *Dove Homes, Inc.*, 87-INA-680 (May 25, 1988) (*en banc*); Moreover, good-faith recruitment is not established where the employer attempts to recontact a U.S. worker after initially rejecting him or her to find that the applicant is no longer available. *Roman Catholic Diocese of Brooklyn*, 90-INA-453 (Apr. 13, 1992). See also, *Bobby McGee's*, 91-INA-39 (Apr. 15, 1992). Therefore, the Employer in this case has not cured any initial violations by offering Mr. Benaracsh the position nine months after his initial rejection.

Furthermore, the only evidence that the Employer submitted in this case to show that the applicant was unable to prepare the above-mentioned meals is a menu, apparently from one of Mr. Benaracsh's former employers (AF 9-11). This evidence, however, is insufficient to meet the Employer's burden. In his rebuttal, the Employer stated that he initially rejected the applicant because he was unable to prepare, season, and cook certain dishes, such as spinach, meat, and chicken pies, and desserts, such as baklava, bird's nest, and mini-roses (AF 38). Upon review of the record, it appears that the applicant's former place of employment, Carmel Deli, indeed serves some of the same or similar dishes that the Employer alleged Mr. Benaracsh could not prepare (AF 9-11). For instance, this restaurant serves baklava, as well as assorted meat and chicken dishes. As such, we find that this one menu, without more, does not meet the Employer's burden of showing that there are not any U.S. workers who are "able, willing, qualified and available" to perform the work as required by §656.1. Accordingly, the CO's decision to deny labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of December, 1996, for the Panel.

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.